DEC 7 PAGE 2

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No. 79-488

In the Supreme Court of the United States

OCTOBER TERM, 1979

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
Assistant General Counsel

VINCENT BLACKWOOD
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20506

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 599 F. 2d 322. The report and recommendation of the magistrate (Pet. App. A-25 to A-32), which was approved and adopted by the district court (Pet. App. A-33), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The petition for a writ of certiorari was filed on September 22, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has authority under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 to seek relief from discriminatory practices affecting a class of individuals without being certified as a class representative under Rule 23 of the Federal Rules of Civil Procedure.

STATUTE INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, is reproduced in the Appendix to the petition (Pet. App. A-34 to A-40).

STATEMENT

The Equal Employment Opportunity Commission instituted this suit under Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), against General Telephone Company of the Northwest, Inc., its subsidiary West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers. The complaint, as amended, alleges that General Telephone discriminates against female employees with respect to assignment to craft jobs and managerial positions throughout the company. The complaint also alleges that General Telephone's maternity leave policies violate Title VII. The Commission seeks injunctive relief, as well as back pay, for individuals affected by the challenged practices (Pet. App. A-7).

The allegations in the complaint are based on information obtained by the Commission in the investigation of charges of discrimination filed by four individuals against General Telephone and the union. As a result of these investigations the Commisson found reasonable cause to believe that General Telephone was discriminating against female employees in the manner

alleged in the complaint. After efforts at conciliation proved unsuccessful, the Commission instituted this lawsuit (Pet. App. A-7 n.1).

The district court referred the case to a magistrate for trial. Thereafter, General Telephone filed a motion asking the court to dismiss the "class action aspects" of the Commission's complaint (Pet. App. A-25). The company argued that, because the Commission had not moved for certification as a class representative pursuant to Fed. R. Civ. P. 23 within the time limit set by local Rule 23 of the Western District of Washington, no relief could be obtained for anyone in this case except the named individual employees whose charges gave rise to the complaint. The magistrate recommended that this motion be denied, and the district court adopted that recommendation (Pet. App. A-25 to A-33).

An interlocutory appeal from this ruling was certified pursuant to 28 U.S.C. 1292(b). The court of appeals affirmed, holding that the Commission could obtain relief under Section 706 of Title VII for a class of individuals harmed by discrimination without being certified as a class representative under Rule 23 (Pet. App. A-1 to A-24). The court of appeals noted that neither the terms of Rule 23 nor Title VII require class certification and that, in the context of a Commission suit, the class certification process would be time consuming and costly and would serve no useful purpose (Pet. App. A-12 to A-23).

ARGUMENT

1. Although the Commission believes that the court of appeals was correct in holding that the Commission need not be certified as a class representative under Rule 23 in order to obtain relief pursuant to Section 706(f)(1) for a group of individual victims of unlawful employment discrimination, we join the petitioner in urging the Court

to grant the petition for a writ of certiorari. As petitioner has pointed out, the decision in this case is in direct conflict with the decision of the Fifth Circuit in *EEOC* v. *D.H. Holmes Co.*, 556 F. 2d 787 (1977), cert. denied, 436 U.S. 962 (1978).[1] There is also a substantial split among the district courts that have decided this question.[2] As a consequence, the Commission is faced with conflicting procedural requirements for obtaining relief for victims of discrimination in federal courts. Moreover, the Commission faces uncertainty as to which procedure to follow in the courts that have not yet decided the question. Because this uncertainty impedes the Commission's efforts to enforce Title VII, this Court should resolve the conflict among the lower courts.

2. We note that the conflict presented in this case concerning the applicability of Rule 23 to Commission enforcement actions may also affect litigation under a variety of statutes other than Title VII. There are many federal statutes that authorize private actions and also provide for governmental suits that may benefit individuals. These statutes include the fair housing provisions of the Civil Rights Act of 1968, 42 U.S.C. 3613, the Equal Credit Opportunity Act, 15 U.S.C. 1691e(h), Titles II, III, and IV of the Civil Rights Act of 1964, 42 U.S.C. 2000a-5, 2000b, 2000c-6, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132, the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Fair Labor Standards Amendment of 1977, 29 U.S.C. (Supp.

[1]The Commission petitioned for a writ of certiorari in the *D.H. Holmes* case.

[2]See Pet. 5-6 n.1 for a list of conflicting district court decisions. See also *EEOC* v. *Mid-City Care Center*, 20 Empl. Prac. Dec. para. 30,275 (W.D. Tenn. 1979), holding that Rule 23 does not apply to Commission suits under Section 706 of Title VII.

I) 216(c). For example, the question whether Rule 23 applies to a government enforcement action under the Equal Pay Act is presently pending before the Fifth Circuit in *Marshall* v. *University of Texas*, No. 78-1787.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
Assistant General Counsel

VINCENT BLACKWOOD
Attorney
Equal Employment Opportunity Commission

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